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### Farmer v. State, 133 Nev. Adv. Op. 86 (Nov. 16, 2017)

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CRIMINAL PROCEDURE: JOINDER APPEAL

**Summary**

The Nevada Supreme Court determined that (1) Under NRS 173.115(2), separate offenses may be joined against a defendant when they are committed as parts of a common scheme where the defendant's separate crimes share features idiosyncratic in character; and (2) under NRS 174.165(1), joinder is proper in situations where a defendant commits similar offenses in separate instances.

**Background**

Over a two-month period in 2008, five female patients treated at Centennial Hills Hospital by certified nursing assistant (CNA), Steven Farmer, were sexually assaulted. After one victim reported her incident to the hospital and police, an investigation ensued. After law enforcement issued a media release, the other four victims came forward, initiating individual actions against Farmer.

At trial, each of the individual actions became one, after the lower court granted the State's motion to join the five victims' claims. Together, the victims alleged that Farmer touched them in inappropriate sexual manners. Also, other witnesses, including a witness offered by the defense, testified about Farmer's unusual behavior, corroborating portions of the victims' testimonies. Ultimately, Farmer was convicted by a jury of four counts of sexual assault, eight counts of open or gross lewdness, and one count of indecent exposure. Farmer was sentenced to three consecutive life terms of imprisonment with the possibility of parole after ten years, as well as other concurrent sentences. Farmer appealed.

**Discussion**

II.  
A.

On appeal, Farmer's main contention was that the trial court abused its discretion by granting the State's motion to join his offenses because precedent suggested that only those offenses considered as pre-planned steps up the ladder toward a specific, predetermined goal could be joined. Farmer argued that the reasoning behind the lower court's decision—that his offenses were parts of a common scheme or plan—was erroneous because the State did not show that each offense was an integral part of an overarching criminal enterprise. The State countered Farmer's arguments by pointing to similarities between his five offenses, claiming that the similarities demonstrated that the offenses were committed pursuant to design as opposed to being crimes of opportunity.

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<sup>1</sup> By Maliq Kendricks.

B.

Looking into the language of NRS 173.115(2)<sup>2</sup>, which provides that separate offenses may be joined if they are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, the Court agreed with the State that Farmer's offenses could be joined. The Court explained that the statute's words "scheme" and "plan," have different implications regarding theories of joinder. Instead of reading the statute's "parts of a common scheme or plan" language as one phrase with one meaning, the Court concluded that the statute permits joinder if the offenses are "parts of a common scheme" or "parts of a common plan." The Court noted that the phrases were not synonymous, describing a common plan as "crimes related to one another for the purpose of accomplishing a particular goal," and a common scheme as "crimes that share features idiosyncratic in character."<sup>3</sup>

C.

Before categorizing Farmer's multiple offenses as parts of a common scheme, the Court explained that it looks to certain factors to determine whether a common scheme exists. The features include: (1) degree of similarity of offenses<sup>4</sup>; (2) degree of similarity of victims<sup>5</sup>; (3) temporal proximity<sup>6</sup>; (4) physical proximity<sup>7</sup>; (5) number of victims<sup>8</sup>; and (6) other context-specific features<sup>9</sup>.

Thereafter, the Court found little difficulty in concluding that Farmer's offenses were adequately shown to have been parts of a common scheme. The Court explained that because each of Farmer's offenses occurred within the span of several weeks, at Centennial Hills Hospital, and the victims were markedly similar in that each was in a vulnerable state having been taken to the hospital by ambulance after a traumatic medical episode, the cumulative effect of Farmer's offenses constituted parts of a common scheme.

Of particular relevance to the Court was that the offenses were not based on one or two incidents widely separated in time, but more so the allegations of five unrelated victims who claimed that Farmer touched them sexually while suggesting, or outright stating, that the touching was a part of their medical care. The Court held that Farmer used his position as a CNA to access unusually vulnerable victims and exploit them under the guise of providing medical care, because Farmer's offenses involved too many similar factors when viewed together.

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<sup>2</sup> NEV. REV. STAT. § 173.115(2) (1967).

<sup>3</sup> Scott v. Commonwealth, 651 S.E.2d 630, 635 (Va. 2007).

<sup>4</sup> Tabish v. State, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003).

<sup>5</sup> *Id.* at 303, 72 P.3d at 590.

<sup>6</sup> Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

<sup>7</sup> Griego v. State, 111 Nev. 444, 449, 893 P.2d 995, 999 (1995).

<sup>8</sup> *Id.*

<sup>9</sup> Other courts have looked to similar facts. *See* United States v. Ortiz, 613 F.3d 550, 557 (5th Cir. 2010); State v. Elston, 735 N.W.2d 196, 199 (Iowa 2007); Commonwealth v. Pillai, 833 N.E.2d 1160, 1166 (Mass. 2005).

D.

Farmer then argued that according to NRS 174.165(1), he should have been granted five separate trials, and joinder was fundamentally unfair. NRS 174.165(1) states that the Court may grant separate trials if joinder is prejudicial against the defendant.<sup>10</sup> Farmer argued that joinder of his victims' claims created too great a risk that the jury would improperly infer that he had a propensity to commit the sexual acts without considering each charge separately. The Court held that the lower court's joinder was not unfair, because the State did not make a propensity argument. The State merely argued that the number of victims, and the similarity of their stories, was evidence that the offenses occurred as claimed.

III.

Also, on appeal, Farmer alleged that his rights under Nevada and federal law were violated before trial, during trial, and at sentencing.

A.

First, Farmer argued that his Sixth Amendment right to a fair and speedy trial was violated. However, the Court held that because the defense delayed the trial, and Farmer waived his speedy trial right, his Sixth Amendment right was not violated.

B.

Second, Farmer argued that because the trial court did not allow him to cross-examine the victims and their nurses, his Confrontation Clause rights were violated. The Confrontation Clause imposes reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant.<sup>11</sup> The Court held that because the Confrontation Clause guarantees an opportunity for effective cross-examination, an opportunity that was apparent to Farmer, his Confrontation Clause rights were not violated.

C.

Third, Farmer argued that the trial court abused its discretion in making several evidentiary decisions. The Court held Farmer's claims to be minuscule and dismissed each of them.

D.

Fourth, Farmer argued that the prosecutor committed numerous instances of misconduct during his trial at the lower court. However, the Court highlighted that Farmer

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<sup>10</sup> NEV. REV. STAT. § 174.165(1) (1967).

<sup>11</sup> Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

“only fairly and contemporaneously objected to one.”<sup>12</sup> The Court regarded Farmer’s claims as unpreserved misconduct and concluded that Farmer failed to demonstrate plain error that affected his substantial rights.

E.

Last, Farmer argued that his sentence constituted cruel and unusual punishment because his five offenses caused substantial harm. The Court held that cumulative error did not warrant Farmer relief.

### **Conclusion**

The Nevada Supreme Court affirmed the lower court’s decision to join five separate sexual offenses, committed by Steven Farmer, against woman he encountered in his position as a Certified Nursing Assistant. Steven Farmer remains guilty of four counts of sexual assault, eight counts of open or gross lewdness, and one count of indecent exposure.

### **Dissent**

The dissent argued against these conclusions, claiming that joinder under NRS 173.115(2) was invalid because the legislature did not intend to allow for joinder based on the similarity of offenses, and that if it wanted to, it could have expressly done so as provided for in the federal rules. The dissent further clarified that the Court should not have expanded the types of offenses that are joined by case law by a strained reading of “common scheme.”

The dissent also reasoned that even if joinder were not improper, the Court should have ordered separate trials under NRS 174.165 based on prejudicial joinder. The dissent explained that the evidence for the charges involving each of the five victims was weak and presented a close call of guilt, which increased the danger that the jury would unfairly accumulate it. The dissent concluded that the majority’s allowance of joinder against Farmer was fundamentally unfair and warrants reversal and remand for separate trials.